82-159

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

SYRACUSE SAVINGS BANK; RAYMOUR FURNITURE COMPANY, INC.; FIRESTONE TIRE AND RUBBER COMPANY, INC.; COLE MUFFLER, INC.; CARROLLS DEVELOPMENT CORPORATION, doing business under the name and style of Cinema East and Mini One Theatres; SLOTNICK ENTERPRISES, INC., doing business under the name and style of DeWitt Drive In; FRANKLIN FURNITURE DEWITT CORP.; DEWEY FURNITURE CORPORATION, doing business under the name and style of Roth Bros. Manor House; DANA ELSTON, doing business under the name and style of International House of Pancakes; BRANG CO., INC.; MICHAEL DEY LIN-

(OVER)

On Appeal From The Court Of Appeals Of New York

JURISDICTIONAL STATEMENT

HEIM, KOLDIN, CANTER & LEVINE
Attorneys for Appellants
305 Montgomery Street
Syracuse, New York 13202
(315) 472-8845

Leonard C. Koldin, Esq.
Dated: July 16, 1982

COLN-MERCURY, INC.; MO-RU OF DEWITT, INC., doing business under the name and style of Burger King; ENZA MUFFLERS, INC., doing business under the name and style of Midas Shops; DEWITT HIGHWAY HOTEL, INC., doing business under the name and style of DeWitt Ranch Motel; HOWED DISTRIBUTORS, INC., doing business under the name and style of Kids Town; MACARTNEY & TOLLES, INC., doing business under the name and style of Kentucky Fried Chicken; SOO-LIN RESTAURANT CORP.; ROCHESTER SHOE STORE OF DEWITT, INC.; SYRACUSE DONUT, INC., doing business under the name and style of Dunkin Donuts; DAVID F. KROFT, doing business under the name and style of Whale of a Wash of DeWitt; THE WARDROBE FORMALWEAR, INC.; DEWITT CAR WASH, INC.; PETER'S GROCERIES, INC.; CAPTAIN AHAB'S SEAFOOD GALLEY, INC.; MAY ITALIA, INC., doing business under the name and style of Chef Italia Restaurant; GREGORY BANOS, doing business under the name and style of DeWitt Plaza; COLOR TILE SUPERMARTS, INC.; DEWITT BICYCLE CO., INC.; HELENE KAZACOS, doing business under the name and style of Carousel Hair Stylists; DEWITT SPORT SHOP, LTD.; COMPUTER SHOP OF SYRACUSE, INC.; LUND'S MEN'S SHOP, INC.; M. GOLDBERG & SONS — SYRACUSE, INC.; TILE & CARPET TOWN EAST, INC.; B.W. STREETER, INCORPORATED, doing business under the name and style of Arby's; HARVEY SHURE, doing business under the name and style of H.J.S. Enterprises (Harvey's Shopping Plaza); RITE AID OF NEW YORK, INC.; and FRIENDLY ICE CREAM CORP.,

Appellants,

vs.

TOWN OF DEWITT,

Appellee.

QUESTIONS PRESENTED

By this appeal, appellants present the following questions and issues to this Court:

1. Whether Section 53-30 of the Town Code of the Town of Dewitt is unconstitutional on its face and as applied to the appellants in that it discriminates against certain non-commercial and commercial speech, discriminates against certain non-commercial and commercial property owners and users, affords preferential treatment to certain commercial and industrial property owners and users and denies appellants equal protection of the law.

2. Whether Section 53-30 of the Town Code of the Town of Dewitt is unconstitutional on its face and as applied to the appellants in that it denies appellants their constitutional right of freedom of speech by requiring the discontinuance of and removal of on-site free-standing business identification signs, thus depriving appellants of an operative form of advertising and of business identification.

3. Whether Section 53-30 of the Town Code of the Town of Dewitt is unconstitutional on its face and as applied to the appellants in that it deprives the appellants of their Fifth Amendment right to property without due process of law and represents a taking of property without due process of law and without just compensation.

4. Whether the appellants were denied due process of law in the Courts below by the summary action taken by said Courts without affording the appellants an evidentiary hearing on the constitutionality of Section 53-30 of the Town Code of the Town of Dewitt as applied to them.

PARTIES

The parties to this appeal in this Court are the same as those set forth in the caption of this Jurisdictional Statement.

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Appellants,

vs.

TOWN OF DEWITT,

Appellee.

On Appeal From The
Court Of Appeals Of New York

JURISDICTIONAL STATEMENT

The appellants named-above appeal from the Decision, Order and Judgment of the Court of Appeals of the State of New York, dated and entered in said Court on May 4, 1982, holding that Section 53-30 of the Town Code of the Town of Dewitt is Constitutional as applied to commercial speech and as not being violative of appellants' Constitutional rights of equal protection of the laws and the taking or denial of property

without just compensation or due process of law, as guaranteed by the First, Fifth and Fourteenth Amendments of the Constitution of the United States.

Appellants submit this Jurisdictional Statement in support of this Court's entertaining jurisdiction herein.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals of the State of New York, which is set forth in its entirety in the Appendix hereto, is reported at *56 NY2d 671*. The written Decision dated August 17, 1979 of Honorable John R. Tenney, Justice of the Supreme Court, Onondaga County, New York, which was adopted in its entirety by the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, is not a reported Decision. The text thereof is also set forth in its entirety in the Appendix hereto.

JURISDICTION

At issue in this litigation is the constitutionality of Section 53-30 of the Town Code of the Town of Dewitt, Onondaga County, New York. That ordinance, with certain exceptions, requires the removal of and precludes the erection of all free-standing identification signs in the Town of Dewitt, Onondaga County, New York. The law applies both to permanent on-premises and off-premises identification signs of both a commercial and non-commercial nature.

Appellants commenced this action in the Supreme Court of New York, in and for the County of Onondaga, for a declaratory judgment pursuant to Section 3001 of the Civil Practice Law and Rules of the State of New York. By Order entered in the Office of the Clerk of Onondaga County December 7, 1979, the Supreme Court of New York, Honorable John R. Tenney, Justice of the Supreme Court

presiding, granted appellee's motion for summary judgment, dismissing appellants' Complaint.

By Order entered in the Office of the Clerk of the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, February 13, 1981, the Appellate Division unanimously affirmed the dismissal on Judge Tenney's written Decision dated August 17, 1979.

By Memorandum Decision rendered May 4, 1982, the Court of Appeals of New York modified the lower Court to the extent of declaring the ordinance constitutional as applied to commercial speech and, as modified, affirmed the Appellate Division.

In so doing, the Court of Appeals held that said ordinance did not violate appellants' constitutionally guaranteed rights of free speech or equal protection of the law, and did not constitute a taking or denial of property or property rights without due process of law or just compensation.

On June 11, 1982, and within ninety (90) days of the Decision, Order and Judgment of the Court of Appeals, appellants duly filed their Notice of Appeal therefrom to this Court, said Notice of Appeal being filed with the Court of Appeals of the State of New York and with the Supreme Court of New York, Onondaga County, the Court to which the Court of Appeals remitted this matter pursuant to Rule 5524 of the Civil Practice Law and Rules of the State of New York.

This appeal is taken pursuant to 28 U.S.C. 1257 (2) in that this is an appeal from a final judgment or decree rendered by the highest State Court in the State of New York in which a decision could be had and there is drawn in question the validity of a statute, law or ordinance, to wit, Section 53-30 of the Town Code of the Town of Dewitt, Onondaga County, New York, which appellants allege is repugnant to the Constitution

of the United States. The Decision of the Court of Appeals was in favor of its validity.

The constitutional issues herein were raised by appellants at the earliest stages of this proceeding, with sufficient allegations being contained in and set forth in their Complaint accompanying the Summons served upon the appellee.

CONSTITUTIONAL PROVISIONS, STATUTES ORDINANCES AND REGULATIONS INVOLVED

First Amendment, United States Constitution

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech,* or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis added)

Fifth Amendment, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.*" (Emphasis added)

Fourteenth Amendment, Section 1, United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added)

Chapter 53, Section 53-30, Town Code of the Town of Dewitt, Onondaga County, New York

The text of Chapter 53 is set forth in the Appendix hereto.

STATEMENT OF THE CASE

On or about March 26, 1973, the appellee (defendant below), Town of Dewitt, a municipal corporation in the County of Onondaga, State of New York, enacted an amendment to Section 53-30 of the Dewitt Town Code, said amended Section being designated "Sign Ordinance Regulations", sometimes hereinafter referred to as the Sign Ordinance. The Sign Ordinance sets forth certain limitations, restrictions and proscriptions applicable to signs in the Town of Dewitt, including, *inter alia*, the prohibition against both on-site (accessory) and off-premises (non-accessory) free-standing identification signs in the Town of Dewitt. This proscription against free-standing signs is applicable to non-commercial as well as commmercial signs and was enacted solely for aesthetic purposes.

The Ordinance specifically relieves certain classes of commercial property users from the proscription against permanent free-standing signs. Those exceptions include certain shopping centers, enclosed shopping malls, and industrial enterprises where the free-standing sign identifies industrial activity conducted on the premises. (A-21, A-22, A-25)

Other than those limited commercial exceptions, and certain signs of a temporary nature, (A-23) free-standing, on-site and

off-site signs in the Town of Dewitt are prohibited by the Sign Ordinance.

The appellants herein (plaintiffs below) each owns or maintains one or more business establishments or commercial properties in either a Business District, Business Transitional District, or an Industrial District in the Town of Dewitt. In the conduct of their respective businesses, and as an incident thereto, the appellants legally erected, and have legally maintained, free-standing accessory signs on their business premises for both advertising and property location and identification purposes. The appellants are representative of a cross-section of businesses in the Town of Dewitt, including banks, restaurants, theatres, gas stations, retail stores, small shopping centers and other service oriented stores. In some instances, appellants permit the use of their premises for non-commercial, civic oriented programs, messages and promotions.

The appellants, and others similarly situated in the Town of Dewitt, have expended millions of dollars developing the business locations in the Town of Dewitt in reliance upon the availability of free-standing identification signs which were permitted at the time of development. In many instances, because of the set backs and positions of buildings in relation both to the street lines and the flow of traffic, the signs have become an integral part of the developed properties and the businesses cannot be adequately identified or located without the free-standing signs.

The Sign Ordinance provides an amortization period during which non-conforming property owners and users were to have come into compliance with the regulations. The amortization period terminated on January 1, 1978. No administrative procedure or remedy is provided for in the Sign Ordinance to extend the amortization period.

By Summons and Complaint dated July 28, 1978, the plaintiffs commenced an action for declaratory judgment in the

Supreme Court of New York, County of Onondaga, asking the Court to declare the Dewitt Sign Ordinance unconstitutional on its face and as applied to the appellants on the grounds that the Ordinance: (1) unfairly and unreasonably discriminates against the appellants and denies appellants equal protection of the law; (2) represents an unlawful taking of appellants' property and property rights without due process of law or just compensation and a taking and denial of appellants' right to carry on their businesses in the Town of Dewitt without due process or just compensation; (3) denies appellants their right of free speech and expression; and (4) was enacted by the Dewitt Town Board in excess of its lawful police powers.

In a Decision dated August 17, 1979, the Honorable John R. Tenney, Justice of the Supreme Court, Onondaga County, granted the appellee's motion for summary judgment thereby summarily dismissing the appellants' Complaint without a hearing and without affording the appellants an opportunity to substantiate the allegations contained in their Complaint with respect to the unconstitutionality of the Sign Ordinance, both on its face and as applied to them.

In his Decision, Judge Tenney made no specific findings on appellants' equal protection, due process and free speech allegations. With respect to the appellants' allegations concerning the denial of property and property rights without just compensation, the Court found that the amortization period provided for in the Ordinance was reasonable as a matter of law. The Court also determined that the Ordinance, which was enacted solely for aesthetic purposes, was a valid exercise of the municipality's police power.

Judge Tenney's Decision of August 17, 1979, was made an Order of that Court and entered on December 7, 1979.

Appellants thereupon appealed the said Decision and Order to the Appellate Division of the Supreme Court of New York, Fourth Judicial Department. The Appellate Division

unanimously affirmed the lower Court upon Judge Tenney's Decision on February 13, 1981.

By Order of the Court of Appeals of the State of New York entered on September 10, 1981, the appellants were granted leave to appeal the Appellate Division's Order to that Court.

By Memorandum Decision dated and entered May 4, 1982, the Court of Appeals of the State of New York modified the Appellate Division to the extent of declaring the Ordinance constitutional as applied to commercial speech and, as modified, affirmed the Appellate Division. The Court of Appeals, in its Decision, determined that in considering the Ordinance in the abstract, and without considering any impact on the appellants, it perceived no error made by the lower Court in upholding the constitutionality and validity of the Ordinance.

Addressing specific issues, the Court of Appeals found that the appellants lacked standing to raise any constitutional First Amendment argument of overbreadth to challenge the Ordinance to the extent that it regulated non-commercial speech. With reference to the application of the Ordinance to commercial speech, the Court could not conclude that the near total proscription of free-standing signs or the regulation of on-building facade signs did not constitute, on the face of the Ordinance, a permissible constraint only as to location and manner.

The Court further found that the record lacked proof that the amortization period provided for in the Ordinance was impermissibly short and that the record lacked admissible evidence to justify an evidentiary hearing as to the constitutionality of the Ordinance as applied to the appellants. It must be emphasized at this point, however, that the lower Court precluded the appellants from making such evidence available to the record by summarily dismissing the appellants' Complaint without a hearing as to any issue.

The Court of Appeals did not specifically address the issue raised by the appellants that the Ordinance was discriminatory and denied the appellants equal protection of the law. The Memorandum Decision of the Court of Appeals dated May 4, 1982, is set forth in its entirety in the Appendix hereto.

Appellants appeal said Decision, Order and Judgment to this Court.

THE QUESTIONS ARE SUBSTANTIAL

I

The Dewitt Sign Ordinance, on its face and as applied, denies appellants and all others similarly situated equal protection of the law by unlawfully favoring certain types of commercial messages while prohibiting non-commercial messages and certain other types of commercial messages.

For example, the Dewitt Sign Ordinance, which was enacted purely for aesthetic purposes, permits enclosed shopping malls to erect and maintain permanent free-standing business identification signs while denying that right to adjoining property owners and lessees, whether they are of a commercial or non-commercial nature. In the Town of Dewitt, for instance, Shoppingtown Mall (the only covered mall in the Town of Dewitt) is entitled to erect and maintain three (3) on-site, free-standing identification signs while the Dewitt Community Church — directly across the street — is not permitted to erect or maintain even one (1) permanent free-standing identification sign, regardless of the message, including the dates or times of its services or the announcement of a church function.

Similarly, Sections 53-30(A)(11)(b) and (c) provide that certain non-enclosed shopping centers are permitted to erect and maintain free-standing shopping center identification signs, the number of which depends upon the number of business establishments or the total gross floor area of the

shopping center. The small, individually owned retail establishment on an adjoining property, however, is not permitted to maintain such a sign, nor is a non-commercial property owner within the same business or business transitional district permitted to maintain such a sign.

Section 53-30E of the Dewitt Sign Ordinance, furthermore, provides that in an industrial district, an industrial enterprise may maintain up to three (3) permanent free-standing identification signs on its premises "for the identification of industrial activity conducted on the premises" and such signs may total up to one thousand (1,000) square feet in area. Since the Ordinance specifically states that such free-standing signs are permitted to identify "industrial activity" only, it follows that other types of activity, such as retail sales, pharmacies, hotels or even non-commercial activities directly adjoining the industrial property are prohibited from maintaining such identification signs.

The Dewitt Ordinance is based on aesthetic considerations only. While aesthetics alone has frequently been adopted and accepted as a justifiable basis for the regulation of commercial signs, where an infringement upon basic constitutional rights is involved, it has been held that the burden falls upon the municipality to substantiate the relative merits of its interests vis-a-vis the constitutional rights being infringed upon. In *Metromedia, Inc., et al. v. City of San Diego, et al, 453 U.S. 490 (1981),* Mr. Justice Brennan, in his concurring opinion, stated:

> "But before deferring to a city's judgment, a Court must be convinced that the City is seriously and comprehensively addressing aesthetic concerns with respect to its environment. Here, San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors of an unattractive environment." *453 U.S. at 531.*

Appellants maintain that no rational basis exists for an aesthetically motivated ordinance, such as appellee's, to prohibit non-commercial property owners and lessees, as well as certain retail type commercial establishments, from maintaining permanent free-standing identification signs on their premises, while authorizing factories to maintain up to one thousand (1,000) square feet of free-standing signs each, particularly where both types of establishments or activities are located side-by-side in the same district. The same argument applies to shopping malls, vis-a-vis the small retail establishment or non-commercial property owner or lessee.

The discriminatory treatment inherent in the Ordinance takes this regulation out of the domain of time, place and manner restriction, and distinguishes between permissible and impermissible signs at a particular location by reference to content, i.e., what the sign purports to advertise, e.g., industrial activity or a shopping center -vs- non-industrial activity or a small retail establishment, or even a non-commercial message.

II

It is well established that commercial free speech is a protected right under the Constitution. *Bates, et al. v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia Pharmacy Board v. Virginia Consumer Council 425 U.S. 748 (1976).* Although some regulation may be placed on commercial speech, particularly as to time, place and manner of the commercial speech, the criteria to be applied in judging the validity of such governmental restrictions on commercial free speech, as adopted in *Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980),* is a four part test: (1) The speech must concern legal activity and may not be misleading; (2) The restriction must seek to implement a substantial government interest; (3) The restriction must

directly advance that interest; (4) The restriction may not reach farther than necessary to accomplish the given objective.

As applied to the Dewitt Sign Ordinance, the Sign Ordinance satisfies tests one and two of the *Central Hudson* criteria, but falls short with respect to tests three and four.

As previously shown, the prohibition of permanent free-standing identification signs is not uniformly applied throughout the Town of Dewitt. Rather, certain commercial and industrial property owners and users are permitted substantial free-standing signs while others, including non-commercial owners and users, may not take advantage of such signs. The unequal treatment afforded by the Ordinance denigrates the appellee's purported interest in aesthetics and causes this Ordinance to fail the third *Central Hudson* test.

Similarly, appellants maintain that the Ordinance fails the fourth *Central Hudson* test in that it reaches farther than necessary to accomplish the given objective (i.e., aesthetics).

It has done this by the near total proscription of free-standing signs in the Town of Dewitt, with the few select exceptions, thus denying appellants an operative form of advertising. It should be emphasized, again, that whereas the San Diego Ordinance permitted on-site free-standing identification signs, the Dewitt Ordinance prohibits the appellants from maintaining such identification signs. The Court in *Metromedia* found that since on-site signs were permitted, that Ordinance did not reach farther than necessary to accomplish the given objective.

Likewise, in *Suffolk Outdoor Advertising Co., Inc., v. Hulse, 43 NY2d 483 (1977),* the distinction between accessory (on-site) signs and non-accessory (off-premises) billboard signs, was noted by the Court, stating:

> "Although permitting non-accessory billboards, the Ordinance permits the maintenance of accessory or on-

> premises billboards, thus providing an operative form of advertising". *43 NY2d at 490.*

Under the facts of this case, where such on-premises signs were legal when erected, and where the businesses grew in part as a result of such signs, the signs have become a part of the businesses themselves, just as the structures housing the businesses are part of them, and the authority to conduct the businesses in the district carries with it the right to maintain business signs on the premises. *(United Adv. Corp. v. Borough of Raritan, 11 N.H. 144).*

The Court of Appeals held that the appellants herein lacked standing to raise any constitutional First Amendment argument of overbreadth to challenge the Ordinance to the extent that it regulates non-commercial speech. However, in *Metromedia,* Mr. Justice Stevens, in his dissenting opinion, pointed out,

> "The only information in the record about on-site signs is that they 'advertise businesses, goods or services available on the property on which the sign is located'. There is no evidence that any on-site signs in San Diego of the permanent character covered by the Ordinance have ever been for non-commercial messages." *453 U.S. at 543.*

The Court in *Metromedia* found standing on the part of the billboard owners to challenge the San Diego Ordinance on free speech grounds although, as pointed out by Mr. Justice Stevens, there was no evidence in the record that non-commercial messages have even been placed on such billboards.

The *Metromedia* case was submitted to this Court on stipulated facts which established the interest of appellants therein in non-commercial speech.

In the case at bar, however, the parties have not stipulated as to the facts. Moreover, because of the summary dismissal of appellants' Complaint at the earliest stages of this action, appellants were precluded from establishing their interest in

non-commercial speech, as well as the impact this Ordinance has on appellants with respect to such non-commercial speech.

It was error for the Court below to deny appellants an opportunity to make such a record and then to point to the record as a basis for denying appellants standing on the issue of the constitutionality of the Ordinance as it applies to non-commercial speech.

By limiting the declaratory judgment to the constitutionality of this Ordinance as applied to commercial speech only, the Court of Appeals left open the question of the constitutionality of the Ordinance as applied to non-commercial speech. Standing should have been awarded to the appellants to raise that issue and the Court should have considered that issue on its merits.

III

The Sign Ordinance herein denies appellants their property without due process and without just compensation by the forced removal of their free-standing signs which were legal when erected and in which appellants made substantial investments.

The amortization period provided for in the Ordinance was apparently intended to permit the appellants, and others similarly situated, an opportunity to recoup their investments in the free-standing signs before having to remove them.

While the utilization of an amortization period in lieu of cash payment by the municipality to the property owner has become an accepted means of compensating the property owner for the removal of the sign, whether an amortization period is reasonable is a question which must be answered in light of the facts of each particular case. *(Modjeska Sign Studios, Inc., v. Berle, 43 NY2d 468, 480 (1977))*. The factors which the Court in *Modjeska* deemed essential to consider in determining

whether an amortization period is reasonable included initial capital investment, investment realization to date and the life expectancy of the investment. The Court below in the case at bar never considered those factors but rather held the amortization period provided for in the Dewitt Sign Ordinance was reasonable as a matter of law.

The validity and reasonableness of an amortization period cannot be properly determined without the benefit of an evidentiary hearing at which the Court can become educated as to the costs involved, economic harm to be caused and the economic factors to be considered in arriving at a reasonable amortization period.

The Court below foreclosed the appellants from sustaining their position with respect to the unreasonableness of the amortization period by summarily rejecting the appellants' action without an evidentiary hearing on that issue. Similarly, the record does not disclose the studies, criteria or other factors, if any, which the appellee relied upon or followed in determining that the amortization period provided for was sufficient to permit appellants to recover their investments.

Such a determination by the Court below was tantamount to a taking of appellants' property without due process or just compensation. This is particularly so where, as here, the Dewitt Sign Ordinance does not provide for any specific administrative procedure for extending or otherwise challenging the amortization period.

Likewise, while aesthetics, per se, forms a valid basis for a zoning regulation, in order to be a valid exercise of the municipality's police power the Ordinance must be reasonable and conducive to the public health, safety, morals or general welfare of the regulating community. *Matter of Cromwell v. Ferrier, 19 NY2d 163 (1967).* The determination as to whether an Ordinance such as that in issue meets this test so as to be a valid exercise of the municipality's police power is a factual

determination based on the particular circumstances of the case and not one that can necessarily be decided on a motion for summary judgment.

In his concurring Opinion in *Metromedia, supra,* Mr. Justice Brennan, with whom Mr. Justice Blackmun joined, agreed that each Ordinance be viewed in light of the particular facts of each case. The San Diego Ordinance was founded on traffic safety. Mr. Justice Brennan pointed out that although bans on billboards in other areas may have had a bearing on traffic safety in those localities, he would not be so quick to accept legal conclusions in other cases as an adequate substitute for evidence in the *San Diego* case that standing billboards directly furthered traffic safety. Likewise, with regards to the Dewitt Sign Ordinance, although aesthetics may have been found to be a valid basis for such an Ordinance in other cases, there must still be a finding, based on evidence received at a hearing, that the Town of Dewitt is seriously and comprehensively addressing aesthetic concerns with respect to its environment by the enactment of this Ordinance. Because of the discriminatory application of this Ordinance, as shown above, one must seriously question the intent and purpose of this Ordinance, and that inquiry should be held through an evidentiary hearing.

CONCLUSION

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

HEIM, KOLDIN, CANTER & LEVINE
BY: Leonard C. Koldin, Esq.
Attorneys for Appellants
305 Montgomery Street
Syracuse, New York 13202

APPENDIX

Memorandum Decision of the Court of Appeals of New York, dated May 4, 1982

Remittitur of the Court of Appeals of New York, dated May 4, 1982

Order of Appellate Division of the Supreme Court of New York, Fourth Judicial Department, Affirming Decision and Order of Supreme Court, Onondaga County, entered February 13, 1981.

Order of Supreme Court, Onondaga County, dated December 6, 1979, entered December 7, 1979

Decision of Honorable John R. Tenney, Justice of the Supreme Court, Onondaga County, dated August 17, 1979

Notice of Appeal to the Supreme Court of the United States

Section 53-30, Town Code of the Town of DeWitt, Onondaga County, New York

Memorandum Decision of the Court of Appeals of New York, dated May 4, 1982

STATE OF NEW YORK
COURT OF APPEALS

4 No. 204
Syracuse Savings Bank, et al.,

Appellants,

v.

Town of DeWitt,

Respondent.

(204) Leonard C. Koldin & Benjamin D. Levine, Syracuse, for appellants.

Eric M. Alderman, Joseph W. Jerry, & Bernard Samuels, Syracuse, for respondent.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

MEMORANDUM.

The order of the Appellate Division should be modified, with costs to respondent, to the extent of directing judgment in favor of defendant declaring that Section 53-30 of the Town Code of the Town of DeWitt is constitutional insofar as .. egulates commercial speech.

In this action seeking a declaration that the "Sign Ordinance" of the Town of DeWitt is unconstitutional the Appellate Division affirmed Supreme Court's dismissal of the complaint on the motion of defendant Town for summary judgment. Inasmuch as plaintiffs tendered no evidentiary proof

in admissible form[1] there is no evidence before us as to the practical application of the ordinance or its prospective impact in the Town of DeWitt, and no showing of facts sufficient to require an evidentiary hearing as to issues of fact. Accordingly, on the record before us the sign ordinance can be considered only in the abstract without consideration of any impact on plaintiffs. From that very narrow perspective we perceive no error made by the courts below in upholding the constitutionality and validity of the ordinance against the challenges mounted by plaintiffs. We address only the principal contentions advanced by plaintiffs in our Court.

At the threshold we observe that because plaintiffs, an extensive assemblage of business and commercial enterprises in the Town, have shown no direct interest in noncommercial speech and no commercial interest in others who themselves have such an interest, they lack standing to raise any constitutional First Amendment argument of overbreadth to challenge the ordinance to the extent that it regulates, or may be said to regulate, non-commercial speech.

With reference to the application of the ordinance to commercial speech, we cannot conclude that the near total proscription of free standing signs or the regulation of on-building facade signs as to size and height do not constitute, on the face of the ordinance, a permissible constraint only as to

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[1]The only exception, immaterial for present purposes, was the affidavit of the former Town Director of Police with respect to conditions of vehicular and pedestrian traffic in the Town and his opinion as to the impact of the sign ordinance thereon.

Contrast, for instance, the extensive discovery leading to the comprehensive stipulation of facts on which the courts' rulings were based in *Metromedia, Inc. v City of San Diego* (___ US ___, 49 USLW 4925), on the basis of which plaintiffs sought and obtained leave to appeal in this case.

location and manner *(Suffolk Outdoor Adv. Co. v Hulse,* 43 NY2d 483; *Modjeska Sign Studios v Berle,* 43 NY2d 468). Nor is there any proof in the record that the four-year, nine-month period between the adoption of the ordinance and its effective date created an impermissibly short amortization period.[2]

Inasmuch as this is a declaratory judgment action, the proper disposition on the granting of defendant's motion for summary judgment should have been a declaration that the sign ordinance is constitutional rather than a dismissal of the complaint *(Lanza v Wagner,* 11 NY2d 317, 334).

* * * * * *

Order modified, with costs to respondent, in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Meyer concur.

Decided May 4, 1982

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[2]We note the provision in the order of Supreme Court, affirmed at the Appellate Division and left standing by us, "that all rights are reserved to the individual plaintiffs to apply for appropriate administrative relief from the defendant upon a proper demonstration of need for such relief."

Remittitur of the Court of Appeals of New York, dated May 4, 1982

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

4 No. 204
Syracuse Savings Bank, et al.,

Appellants,

v.

Town of DeWitt,

Respondent.

The appellant(s) in the above entitled appeal appeared by Heim, Koldin & Canter; *the respondent(x) appeared by* Alderman, Samuels, Jerry & Rossi.

The Court, after due deliberation, orders and adjudges that the order is modified, with costs to respondent, in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Meyer concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Onondaga County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 4, 1982.

Order of Appellate Division of the Supreme Court of New York, Fourth Judicial Department, Affirming Decision and Order of Supreme Court, Onondaga County, entered February 13, 1981

SUPREME COURT
OF THE
STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: CARDAMONE, J.P., SIMONS, CALLAHAN, DOERR, SCHNEPP, JJ.

Syracuse Savings Bank, et al.,

Appellants,

v.

Town of Dewitt,

Respondent.

The above named Syracuse Savings Bank, et al. having appealed to this Court from an order of the Supreme Court, entered in the Onondaga County Clerk's office on December 7, 1979 and said appeal having been argued by Leonard Koldin of counsel for appellants, Emil Rossi of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be and the same hereby is unanimously affirmed with costs on the opinion at Special Term, Tenney, J.

Entered: FEB 13 1981

MARY F. ZOLLER, *Clerk*

Order of Appellate Division of the Supreme Court of New York, Fourth Judicial Department, Affirming Decision and Order of Supreme Court, Onondaga County, entered February 13, 1981

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this*

FEB 13 1981

(SEAL)

MARY F. ZOLLER, *Clerk.*

Order of Supreme Court, Onondaga County, dated December 6, 1979, entered December 7, 1979

At a Motion Term of the Supreme Court held in and for the County of Onondaga, at the County Courthouse in the City of Syracuse, New York on the 6th day of December, 1979.

PRESENT: HON. JOHN R. TENNEY,

Judge

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ONONDAGA

SYRACUSE SAVINGS BANK, et al,

Plaintiffs,

-v-

TOWN OF DEWITT,

Defendant.

79 6021DEC 7 79

ORDER

Index No. _____

The defendant in the above entitled action, having made a motion for an Order pursuant to Civil Practice Law and Rules 3212, directing that summary judgment be entered herein in favor of the defendant and dismissing the Complaint of the plaintiffs on the ground that there is no triable issue involved herein.

NOW, on reading the Complaint and Answer herein, and on reading and filing the Notice of Motion, dated February 14, 1979, with proof of due service thereof, the Affidavit of Joseph W. Jerry, Esq., sworn to February 20, 1979, in support of the motion, and the Affidavit of Leonard C. Koldin, Esq., sworn

Order of Supreme Court, Onondaga County, dated December 6, 1979, entered December 7, 1979

to March 26, 1979, in opposition thereto, and after hearing Emil M. Rossi, Esq., of counsel for Jerry, Rossi, Tisdell & Moore, attorneys for the defendant, in support of the motion and Leonard C. Koldin, Esq., attorney for the plaintiff in opposition thereto and due deliberation having been had, it is, on motion of Joseph W. Jerry, Esq., of counsel for Jerry, Rossi, Tisdell & Moore, attorneys for the defendant,

ORDERED, that the said motion for summary judgment be and the same is hereby granted, and it is further

ORDERED, that the Complaint of the plaintiffs be and the same hereby is dismissed with prejudice, and it is further

ORDERED, that all rights are reserved to the individual plaintiffs to apply for appropriate administrative relief from the defendant upon a proper demonstration of need for such relief.

Signed this 6th day of
December, 1979, at
Utica, New York

ENTER:

/s/ JOHN R. TENNEY, *Judge*
Supreme Court

(FILED DEC 7 12:21 PM '79)

Decision of Honorable John R. Tenney, Justice of the Supreme Court, Onondaga County, dated August 17, 1979

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ONONDAGA

SYRACUSE SAVINGS BANK; RAYMOUR FURNITURE COMPANY, INC.; FIRESTONE TIRE AND RUBBER COMPANY, INC.; COLE MUFFLER, INC.; CARROLS DEVELOPMENT CORPORATION, doing business under the name and style of Cinema East and Mini One Theatres; SLOTNICK ENTERPRISES, INC., doing business under the name and style of DeWitt Drive In; FRANKLIN FURNITURE DeWITT CORP.; DEWEY FURNITURE CORPORATION, doing business under the name and style of Roth Bros. Manor House; DANA ELSTON, doing business under the name and style of International House of Pancakes; BRANG CO., INC.; MICHAEL DEY LINCOLN-MERCURY, INC.; MO-RU OF DeWITT, INC., doing business under the name and style of Burger King; ENZA MUFFLERS, INC., doing business under the name and style of Midas Shops; DeWITT HIGHWAY HOTEL, INC., doing business under the name and style of DeWitt Ranch Motel; HOWED DISTRIBUTORS, INC., doing business under the name and style of Kids Town; MACARTNEY & TOLLES, INC., doing business under the name and style of Kentucky Fried Chicken; SOO-LIN RESTAURANT CORP.; ROCHESTER SHOE STORE OF DeWITT, INC.; SYRACUSE DONUT, INC., doing business under the name and style of Dunkin Donuts; DAVID F. KROFT, doing business under the name and style of Whale of a Wash of DeWitt; THE WARDROBE FORMALWEAR, INC.; DeWITT CAR WASH, INC.; PETER'S GROCERIES, INC.; CAPTAIN AHAB'S SEA-

Decision of Honorable John R. Tenney, Justice of the Supreme Court, Onondaga County, dated August 17, 1979

FOOD GALLERY, INC.; MAY ITALIA, INC., doing business under the name and style of Chef Italia Restaurant; GREGORY BANOS, doing business under the name and style of DeWitt Plaza; COLOR TILE SUPERMARTS, INC.; DeWITT BICYCLE CO., INC.; HELENE KAZACOS, doing business under the name and style of Carousel Hair Stylists; DeWITT SPORT SHOP, LTD.; COMPUTER SHOP OF SYRACUSE, INC.; LUND'S MEN'S SHOP, INC.; M. GOLDBERG & SONS — SYRACUSE, INC.; TITLE & CARPET TOWN EAST, INC.; B.W. STREETER, INCORPORATED, doing business under the name and style of Arby's; HARVEY SHURE, doing business under the name and style of H.J.S. Enterprises (Harvey's Shopping Plaza); RITE AID OF NEW YORK, INC.; and FRIENDLY ICE CREAM CORP.,

Plaintiffs,

-vs-

TOWN OF DeWITT,

Defendant.

APPEARANCES:

JERRY, ROSSI, TISDELL & MOORE
615 University Building
Syracuse, New York 13202
Attorneys for Defendant

HEIM, KOLDIN & CANTER
305 Montgomery Street
Syracuse, New York 13202
Attorneys for Plaintiffs

Dated: August 17, 1979

Decision of Honorable John R. Tenney, Justice of the Supreme Court, Onondaga County, dated August 17, 1979

DECISION

TENNEY, J.

This is a motion for summary judgment brought by the defendant Town of DeWitt. The complaint alleges that Section 53-30 of the DeWitt Town Code is unconstitutional, and that the Town be enjoined from enforcing or from prosecuting violators.

On March 26, 1973, the Town of DeWitt amended Section 53-30 of the Town Code, which amendment was designated "Sign Ordinance Regulation". This ordinance was apparently subsequently amended again in 1978. The 1978 amendments do not effect this litigation. The ordinance attempted to regulate the use of signs throughout the Town.

Freestanding signs are regulated with reference to size and proximity to stores and the street. There appears to be some confusion, but there is no intent to eliminate the freestanding sign. See Section 53-30 A(2) Signs attached to buildings are regulated as to size and height, and limitations are imposed as to other types of advertising gear such as bunting and streamers, etc. In order to give the sign-owners an opportunity to amortize their investment in non-conforming signs, the ordinance provided that enforcement would be postponed until January 1, 1978.

Plaintiffs contend that the Town Board exceeded its authority, that the statute is unreasonable, arbitrary and discriminating and represents an unlawful taking of property and a denial of free speech.

Although the express purpose of the statute is not stated, it appears to be for aesthetic purposes to establish a uniform and controlled sign system in the community. It has been held that

the regulation of outdoor advertising for aesthetic purposes alone is a valid exercise of police power. *Suffolk Outdoor Advertising v. Hulse,* 43 N.Y. 2d 483; *Matter of Cromwell v. Ferrier,* 19 N.Y. 2d 263; *People v. Goodman,* 31 N.Y. 2d 262; *Rochester v. Town of Brighton,* 49 A.D. 2d 273.

In the *Matter of Cromwell v. Ferrier,* at page 272, the court argued, "the eye is entitled to as much recognition as the other senses, but, of course, the offense to the eye must be substantial and must be deemed to have material issue on the community or district pattern". There is no evidence that the aesthetic purpose is at issue.

The plaintiffs in this case make issue over the question of accessory use as compared to non-accessory use of signs. It appears that the ordinance prohibits non-accessory signs. This issue was considered in *Suffolk Outdoor Advertising v. Hulse* and *People v. Goodman,* 31 N.Y. 2d 262. In the *Suffolk Outdoor Advertising Case,* the court said,

> "It cannot be seriously argued that a prohibition of this nature is not reasonably related to improving the aesthetics of the community. Nor can it be said that it is oppressive. (See *People v. Goodman,* 31 N.Y. 2d 262 supra.) Although prohibiting non-accessory billboards, the ordinance permits the maintenance of accessory or on-premises billboards. Thus, providing an operative means of advertising."

Therefore, the DeWitt ordinance is a valid exercise of police power and is constitutional. There is the question of reasonableness as to the extent of the limitations and the time of the amortization period which must be considered.

Basically, the legislative judgment and the legislative determination will not be disturbed unless manifestly

unreasonable. *New York State Thruway v. Ashley*, 10 N.Y. 2d 151, 156. A reading of the ordinance itself does not reflect any particular unreasonable regulation. It is true that the signs are to be limited in size, but the size does not appear to be unreasonable as a matter of law nor is it in any way discriminatory since it is to be uniformly applied.

The other issue is the reasonableness of the waiting or amortization time. The amortization period is to provide a sign-owner with an opportunity to recover his investment. However, "an owner need not be given that period of time necessary to permit him to recoup his investment entirely", *Suffolk Outdoor Advertising v. Hulse*, 43 A.D. 2d 483, 490, and the regulation of signs with a reasonable opportunity to recoup financial investments is not an unlawful taking of property. *Modjeska Sign v. Berle*, 43 N.Y. 2d 468 at 477. The principle of amortization is well established and is discussed in some detail in the Modjeska Case at page 478 and 479.

In the *Matter of Harbison v. City of Buffalo*, 4 N.Y. 2d 553, there was a three-year period for amortization which was sustained by the court as being reasonable. The question as to what is reasonable must be determined on an individual basis. The ordinance Reg. 53-30 A(10) states that all signs which do not conform to the regulations of this ordinance shall be brought into conformity or removed as of January 1, 1978. That is a period of 4-1/2 years, which ir prima facie reasonable. In fact, the signs have not been removed as of this date, August, 1979, which is approximately 6 years.

Although the ordinance does not make such a provision, it is implicit that an individual property-owner who feels aggrieved by the time period, may petition the municipal authorities for an extension of time based upon his individual circumstance. On its face, with the extension created by litigation, the statute

is reasonable, and the amortization period is well within any acceptable or pre-determined guidelines. This court cannot say as a matter of law that there might not be some exceptions and any attempt to do so would be speculative. However, in view of the finding that the ordinance is constitutional and that the guidelines and time period appear reasonable and proper, the motion for summary judgment is granted.

All rights are reserved to the individual plaintiffs to apply for administrative relief upon a proper demonstration of such a need.

Submit order accordingly.

COURT OF APPEALS OF
THE STATE OF NEW YORK

SYRACUSE SAVINGS BANK; RAYMOUR FURNITURE COMPANY, INC.; FIRESTONE TIRE AND RUBBER COMPANY, INC.; COLE MUFFLER, INC.; CARROLS DEVELOPMENT CORPORATION, doing business under the name and style of Cinema East and Mini One Theatres; SLOTNICK ENTERPRISES, INC., doing business under the name and style of DeWitt Drive In; FRANKLIN FURNITURE DEWITT CORP.; DEWEY FURNITURE CORPORATION, doing business under the name and style of Roth Bros. Manor House; DANA ELSTON, doing business under the name and style of International House of Pancakes; BRANG CO., INC.; MICHAEL DEY LINCOLN-MERCURY, INC.; MO-RU OF DEWITT, INC., doing business under the name and style of Burger King; ENZA MUFFLERS, INC., doing business under the name and style of Midas Shops; DEWITT HIGHWAY HOTEL, INC., doing business under the name and style of DeWitt Ranch Motel; HOWED DISTRIBUTORS, INC., doing business under the name and style of Kids Town; MACARTNEY & FOLLES, INC., doing business under the name and style of Kentucky Fried Chicken; SOO-LIN RESTAURANT CORP.; ROCHESTER SHOE STORE OF DEWITT, INC.; SYRACUSE DONUT, INC., doing business under the name and style of Dunkin Donuts; DAVID F. KROFT, doing business under the name and style of Whale of a Wash of Dewitt; THE WARDROBE FORMALWEAR, INC.; DEWITT CAR WASH, INC.; PETER'S GROCERIES, INC.; CAPTAIN AHAB'S SEAFOOD GALLEY, INC.; MAY ITALIA, INC., doing business under the name and style of Chef Italia Restaurant;

Notice of Appeal to the Supreme Court of the United States

GREGORY BANOS, doing business under the name and style of DeWitt Plaza; COLOR TILE SUPERMARTS, INC.; DEWITT BICYCLE CO., INC.; HELENE KAZACOS, doing business under the name and style of Carousel Hair Stylists; DEWITT SPORT SHOP, LTD.; COMPUTER SHOP OF SYRACUSE, INC.; LUND'S MEN'S SHOP, INC.; M. GOLDBERG & SONS — SYRACUSE, INC.; TILE & CARPET TOWN EAST, INC.; B.W. STREETER, INCORPORATED, doing business under the name and style of Arby's; HARVEY SHURE, doing business under the name and style of H.J.S. Enterprises (Harvey's Shopping Plaza); RITE AID OF NEW YORK, INC.; and FRIENDLY ICE CREAM CORP.,

Plaintiffs-Appellants,

-vs-

TOWN OF DEWITT,

Defendant-Respondent.

Index No. 79-6021 (Onondaga County)

Filed: Supreme Court of New York,
Onondaga County — June 11, 1982

Filed: Court of Appeals of New York
June 14, 1982

SIRS:

PLEASE TAKE NOTICE that the appellants named-above in the caption hereof, hereby appeal to the Supreme Court of the United States from the Decision, Order and Judgment of the Court of Appeals of the State of New York dated and entered in said Court May 4, 1982, as remitted to the Supreme Court of the State of New York, Onondaga County, on May 4, 1982 and received by said Court on May 10, 1982, affirming the Order of the Appellate Division of the Supreme Court of the

Notice of Appeal to the Supreme Court of the United States

State of New York, Fourth Judicial Department, as modified, and from each and every part thereof.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: May 11, 1982

HEIM, KOLDIN & CANTER

BY /s/ LEONARD C. KOLDIN
Leonard C. Koldin
Attorneys for Plaintiffs-Appellants
Office and Post Office Address
305 Montgomery Street
Syracuse, New York 13202
(315) 472-8845

TO: ALDERMAN, SAMUELS, JERRY & ROSSI
Attorneys for Defendant-Respondent
Office and Post Office Address
512 Loew Building
Syracuse, New York 13202

Remittitur

THE COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

4 No. 204
Syracuse Savings Bank, et al.,

Appellants,

v.

Town of DeWitt,

Respondent.

Notice of Appeal to the Supreme Court of the United States

The appellant(s) in the above entitled appeal appeared by Heim, Koldin & Canter; *the respondent appeared by* Alderman, Samuels, Jerry & Rossi.

The Court, after due deliberation, orders and adjudges that the order is modified, with costs to respondent, in accordance with the memorandum herein and as so modified, affirmed. Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Meyer concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Onondaga County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 4, 1982.

Section 53-30, Town Code of the Town of DeWitt, Onondaga County, New York

§ 53-30. Sign regulations. [Amended 12-18-67; 3-26-73]

A. General regulations. The following regulations apply to all signs:

(1) No sign in any district may extend over a sidewalk or public right-of-way.

(2) No sign in any district, unless attached to a building, shall be located nearer to a street line than twenty-five (25) feet, nor nearer to a side line than ten (10) feet, except in an Industrial District where it shall not be nearer than thirty-five (35) feet to a side line.

(3) No sign in excess of ten (10) square feet in area shall hereafter be erected, installed or altered except upon written sign permit issued by the Building Code Enforcement Officer.

(4) The area of a sign shall be measured by the area of its background frame where such a frame has been effected by materials, paint, lighting or other means. If the total rectangular areas of letter and symbol groupings in a sign are less than forty percent (40%) of the area of its frame, the maximum permitted area of the sign may be increased by sixty percent (60%). Where a sign consists solely of independent letters or symbols without such a frame, its area shall be measured by the rectangular areas encompassing the letter or symbol groupings. In all districts, except Industrial Districts, for each fifty (50) feet beyond the first hundred (100) feet in depth that a sign is located from the nearest highway, an additional ten percent (10%) may be added to the permitted area of the sign up to a maximum of one hundred percent (100%).

Section 53-30, Town Code of the
Town of DeWitt, Onondaga County, New York

(5) Advertising display upon any structure shall be regarded as a sign subject to this ordinance.

(6) No sign attached to a building in any district other than an Industrial District shall project above the height of the wall upon which it is attached. No sign shall be attached to a wall or facade higher than the average height of the remaining walls of the building. No freestanding sign shall be higher than twenty-five (25) feet above the grade.

(7) No illuminated sign or outdoor illumination shall direct light in a way which would create a traffic hazard, or be unreasonably detrimental to adjoining or neighboring residences.

(8) All accessory advertising devices of commercial enterprises other than signs permitted by these regulations, such as, but not limited to, bunting, pennants, pinwheels, streamers or peripheral lighting are prohibited. No sign shall be flashing, revolving, animated or otherwise in motion. Permits for the temporary display of special announcements for the opening or closing of a business, or for other specific purpose may be granted by the Building Code Enforcement Officer, upon controlled site approval of the Planning Board in accordance with Article XI.

(9) No sign shall obstruct any fire escape, window, door or opening used as a means of egress, for fire-fighting purposes or for ventilation. No sign shall be placed on any sidewalk, hydrant, lamppost, tree, utility pole, fence, or on other public property, except as permitted by other provisions of this section.

(10) All signs which do not conform to the regulations of this ordinance shall be brought into conformity or removed by January 1, 1978. No structural element of a nonconforming sign may be changed unless the resulting sign complies with the current regulations of this ordinance.

(11) Multiple-use establishments in nonresidential districts shall be subject to the following regulations:

(a) Signs for two (2) or more separate business establishments on the same lot or in the same building shall require controlled site approval of the Planning Board as provided in Article XI and upon the further finding that such signs are of a design compatible in style and color with one another.

(b) Shopping centers containing more than six (6) business establishments or over fifty thousand (50,000) square feet of gross floor area shall additionally be permitted to have one (1) shopping center identification sign which may be freestanding, the area of which shall not exceed one and one-half (1½) times the allowable area of a sign in the district at its proposed location, provided that the maximum area of signs for each single establishment within the shopping center visible from the property line shall be reduced by one-half (½).

(c) Shopping centers containing over five hundred thousand (500,000) square feet of gross floor area shall additionally be permitted to have two (2) shopping center identification signs, which

may be freestanding, the total combined areas of which shall not exceed twice the allowable area of a sign in the district at its proposed location, provided that the maximum area of signs for each single establishment within the shopping center visible from the property line shall be reduced by one-half (½).

(d) Enclosed mall shopping centers containing over five hundred thousand (500,000) square feet of gross floor area shall be permitted to have three (3) shopping center identification signs, which may be freestanding, the total combined areas of which shall not exceed three (3) times the allowable area of a sign in the district at its proposed location, provided there are no other shopping center signs visible from the property line.

(12) In all office, industrial or similar complexes consisting of two (2) or more buildings, no sign identifying said complex shall be erected or used except upon controlled site approval of the Planning Board in accordance with Article XI.

(13) In all districts except residential districts, a single non-illuminated temporary advertising sign for the sale or rental of the property upon which it is located may be erected or used except that it may not exceed sixteen (16) square feet in area and must be removed within fourteen (14) days of sale or rental.

B. In residential districts, no sign shall be erected or used except:

Section 53-30, Town Code of the Town of DeWitt, Onondaga County, New York

(1) A single professional or announcement sign which may be illuminated by white light, nor more than two (2) square feet in an area not more than six (6) inches in depth, attached to and parallel with a principal building facade so that its top shall not extend higher than eight (8) feet above finished grade.

(2) A single nonilluminated temporary advertising sign which may be freestanding or attached to the building, nor more than three (3) square feet in area, for the sale or rental of the property upon which it is located, provided that such sign is removed within fourteen (14) days of sale or rental.

(3) A single advertising sign which may be illuminated by white light on one (1) or two (2) faces and may be free-standing or attached to the building but which shall not be more than two (2) square feet in area, for the sale of agricultural products grown on the premises.

(4) Identification signs for multiple-family dwelling projects upon controlled site approval of the Planning Board in accordance with Article XI.

(5) Signs of duly constituted governmental bodies, including traffic or similar regulatory devices, legal notices or appropriate to public or quasi-public buildings.

(6) Signs, posters, flags, plaques or emblems of a temporary nature of political, civic, philanthropic, educational or religious organizations.

(7) Signs not visible off the lot upon which they are situated.

(8) Nonilluminated directional and identification signs not more than one and one-half (1½) square feet in area.

(9) Single builders', architects' and engineers' signs not more than fifteen (15) square feet in area may be erected on a construction site during construction, provided that such sign shall be removed within fourteen (14) days after completion.

C. In Business Transitional Districts, no sign shall be erected or used except:

(1) Those permitted in residential districts.

(2) No more than one (1) sign per street facade for the identification of each primary business conducted on the premises (or its proprietor), not to include advertising of specific products. Each sign shall be attached to and parallel with a street facade of the principal building, may be illuminated and shall have a total area not greater than eight percent (8%) of that proportion of such facade as the floor space of such primary business bears to the total floor space of the building, but not greater than fifty (50) square feet, except as may be modified by provisions of the general regulations.

D. In Business Districts, no sign shall be erected or used except:

(1) Those permitted in residential districts.

(2) Not more than three (3) signs for the identification of each business conducted on the premises. Such signs shall be attached to and parallel with a street facade of the principal building, may be illuminated, and shall have a total area not greater than ten percent (10%) of that proportion of such facade as the floor space for such business bears to the total floor space of the

building, but not greater than a total of seventy-five (75) square feet, except as may be modified by provisions of the general regulations.

E. In Industrial Districts, no sign shall be erected or used except:

(1) Signs permitted in business districts.

(2) Not more than three (3) signs for the identification of an industrial activity conducted on the premises. Such signs may be illuminated, may be freestanding or attached to the building and shall have a total area not greater than fifteen percent (15%) of a street facade of the principal building but not greater than a total of one thousand (1,000) square feet, except as may be modified by provisions of the general regulations.

FILED
AUG 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-159

IN THE

Supreme Court of the United States

October Term, 1982

SYRACUSE SAVINGS BANK; RAYMOUR FURNITURE COMPANY, INC.; FIRESTONE TIRE AND RUBBER COMPANY, INC.; COLE MUFFLER, INC.; CARROLLS DEVELOPMENT CORPORATION, doing business under the name and style of CINEMA EAST AND MINI ONE THEATRES; SLOTNICK ENTERPRISES, INC., doing business under the name and style of DeWITT DRIVE IN; FRANKLIN FURNITURE DeWITT CORP.; DEWEY FURNITURE CORPORATION, doing business under the name and style of ROTH BROS. MANOR HOUSE; DANA ELSTON, doing business under the name and style of INTERNATIONAL HOUSE OF PANCAKES; BRANG CO., INC.; MICHAEL DEY LINCOLN-MERCURY, INC.; MO-RU OF DeWITT, INC., doing business under the name and style of BURGER KING; ENZA MUFFLERS, INC., doing business under the name and style of MIDAS SHOPS; DeWITT HIGHWAY HOTEL, INC., doing business under the name and style of DeWITT RANCH MOTEL; HOWED DISTRIBUTORS, INC., doing business under the name and style of KIDS TOWN; MACARTNEY & TOLLES, INC., doing business under the name and style of KENTUCKY FRIED CHICKEN; SOO-LIN RESTAURANT CORP.; ROCHESTER SHOE STORE OF DEWITT, INC.; SYRACUSE DONUT, INC., doing business under the name and style of DUNKIN DONUTS; DAVID F. KROFT, doing business under the name and style of WHALE OF A WASH OF DeWITT; THE WARDROBE FORMALWEAR, INC.; DeWITT CAR WASH, INC.; PETER'S GROCERIES, INC.; CAPTAIN AHAB'S SEAFOOD GALLEY, INC.; MAY ITALIA, INC., doing business under the name and style of CHEF ITALIA RESTAURANT; GREGORY BANOS, doing business under the name and style of DeWITT PLAZA; COLOR TILE SUPERMARTS, INC.; DeWITT BICYCLE CO., INC.; HELENE KAZACOS, doing business under the name and style of CAROUSEL HAIR STYLISTS; DeWITT SPORT SHOP, LTD.; COMPUTER SHOP OF SYRACUSE, INC.; LUND'S MEN'S SHOP, INC.; M. GOLDBERG & SONS—SYRACUSE, INC.; TILE & CARPET TOWN EAST, INC.; B.W. STREETER, INCORPORATED, doing business under the name and style of ARBY'S; HARVEY SHURE, doing business under the name and style of H.J.S. ENTERPRISES (HARVEY'S SHOPPING PLAZA); RITE AID OF NEW YORK, INC.; and FRIENDLY ICE CREAM CORP.,

Appellants,

vs.

TOWN OF DeWITT,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Motion to Dismiss Appeal or Affirm Judgment Pursuant to Rule 16

ERIC M. ALDERMAN
Attorney of Record for Appellee
512 Loew Building
Syracuse, NY 13202
(315) 422-8131

ALDERMAN, SAMUELS, JERRY & ROSSI
Attorneys for Town of DeWitt
512 Loew Building
Syracuse, NY 13202
(315) 422-8131

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CONCLUSION. For all of the foregoing reasons, the appellants' appeal should be dismissed in all respects or in the alternative, the judgment of the New York Court of Appeals should be affirmed in all respects 28

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United States Constitutional Provisions.

First Amendment, United States Constitution

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech,* or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis added)

Fifth Amendment, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."* (Emphasis added)

Fourteenth Amendment, Section 1, United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."* (Emphasis added)

New York State Constitutional Provisions.

§6. [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such

matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

Amended Nov. 8, 1938; Nov. 8, 1949; Nov. 3, 1959; Nov. 6, 1973, eff. Jan. 1, 1974.

§8. [Freedom of speech and press; criminal prosecutions for libel]

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

§11. [Equal protection of laws; discrimination in civil rights prohbited]

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Adopted Nov. 8, 1938, eff. Jan. 1, 1939.

Statutory Provisions.

Chapter 53, Section 53-30, Town Code of the Town of Dewitt, Onondaga County, New York

The text of Chapter 53 is set forth in the Appendix hereto.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

No. 82-159

SYRACUSE SAVINGS BANK; RAYMOUR FURNITURE COMPANY, Inc.; FIRESTONE TIRE AND RUBBER COMPANY, Inc.; COLE MUFFLER, Inc.; CARROLLS DEVELOPMENT CORPORATION, doing business under the name and style of Cinema East and Mini One Theatres; SLOTNICK ENTERPRISES, Inc., doing business under the name and style of DeWitt Drive In; FRANKLIN FURNITURE DEWITT CORP.; DEWEY FURNITURE CORPORATION, doing business under the name and style of Roth Bros. Manor House; DANA ELSTON, doing business under the name and style of International House of Pancakes; BRANG CO., Inc.; MICHAEL DEY LINCOLN-MERCURY, Inc.; MO-RU OF DEWITT, Inc., doing business under the name and style of Burger King; ENZA MUFFLERS, Inc., doing business under the name and style of Midas Shops; DEWITT HIGHWAY HOTEL, Inc., doing business under the name and style of DeWitt Ranch Motel; HOWED DISTRIBUTORS, Inc., doing business under the name and style of Kids Town; MACARTNEY & TOLLES, Inc., doing business under the name and style of Kentucky Fried Chicken; SOO-LIN RESTAURANT CORP.; ROCHESTER SHOE STORE OF DEWITT, Inc.; SYRACUSE DONUT, Inc., doing business under the

name and style of Dunkin Donuts; DAVID F. KROFT, doing business under the name and style of Whale of a Wash of DeWitt; THE WARDROBE FORMALWEAR, Inc.; DEWITT CAR WASH, Inc.; PETER'S GROCERIES, Inc.; CAPTAIN AHAB'S SEAFOOD GALLEY, Inc.; MAY ITALIA, Inc., doing business under the name and style of Chef Italia Restaurant; GREGORY BANOS, doing business under the name and style of DeWitt Plaza; COLOR TILE SUPERMARTS, Inc.; DEWITT BICYCLE CO., Inc.; HELENE KAZACOS, doing business under the name and style of Carousel Hair Stylists; DEWITT SPORT SHOP, Ltd.; COMPUTER SHOP OF SYRACUSE, Inc.; LUND'S MEN'S SHOP, Inc.; M. GOLDBERG & SONS—SYRACUSE, Inc.; TILE & CARPET TOWN EAST, Inc.; B. W. STREETER, INCORPORATED, doing business under the name and style of Arby's; HARVEY SHURE, doing business under the name and style of H.J.S. Enterprises (Harvey's Shopping Plaza); RITE AID OF NEW YORK, Inc.; and FRIENDLY ICE CREAM CORP.,

Appellants,

vs.

TOWN OF DEWITT,

Appellee.

Motion to Dismiss Appeal or Affirm Judgment Pursuant to Rule 16.

Object of the Motion.

The object of this motion is to dismiss the Appellants' appeal or affirm the judgment of the New York Court of Appeals pursuant to Rule 16.1(b) and (d) of the Rules of this Court in that the Appellants lack standing to raise certain of the issues raised on appeal, and that the remaining issues either fail to present a substantial federal question, were determined below on an adequate non-federal basis or were fully and correctly determined below as controlled by this Court's recent decision in *Metromedia, Inc., et al., v. The City of San Diego, et al.*, 453 U.S. 490 (1981).

The Facts.

1. On March 26, 1973, the Town of DeWitt, a suburban community in Upstate New York, enacted an amendment to Section 53-30 of the DeWitt Town Code, which commonly has been referred to as the "Sign Ordinance". This amendment, which is found in Appendix pages 1-7, regulates only the location, time and manner of signs within the Town of DeWitt.

2. Each of the Appellants operates a commercial business within either a Business Transitional, Business or Industrial District within the Town of DeWitt. In such Districts, the Sign Ordinance, as it relates to the issues at bar, namely the use of free-standing signs, permits the following:

(a) One identification sign for each primary on premises business conducted, attached to a street facade of the

building housing such business in Business Transitional Districts (§ 53-30(C) (2)).

(b) Not more than three identification signs for each primary on premises business conducted, attached to a street facade of the building housing such business in the less restricted Business or Industrial Districts (§ 53-30 (D) (2) and (E) (2)).

(c) Any signs permitted in residential districts which include free standing signs which are temporary or of a temporary nature including those of a political, civic, philanthropic, educational or religious organization (§ 53-30(B) (2), (3), (6) and (8)).

(d) Freestanding identification sign(s) in any non-residential districts for shopping centers of over six establishments or 50,000 square feet, enclosed shopping malls or industrial activities (§ 53-30 (A) (11)).

3. Said Amendment also provided for an amortization period of four years, nine months for non-conforming signs (§ 53-30 (a) (10)) from the date of enactment, that being March 26, 1973 until January 1, 1978.

4. In December of 1977, the month prior to the end of the amortization period, various merchants in the Town of DeWitt requested the Town Board to reconsider its position on non-conforming free standing signs. At that time, the Town Board voted to stay enforcement of the Ordinance, ultimately until June 1, 1978. After a public hearing on June 26, 1978, the Town Board determined not to effect any change in the Sign Ordinance.

5. On or about June 8, 1978, certain merchants received notices of violation of said Sign Ordinance, the failure to

comply with which resulted in the issuance, in early July, 1978, of Appearance Tickets on said violations.

6. On or about July 25, 1978, Appellants commenced an action in New York State Supreme Court, Onondaga County seeking a judgment declaring the DeWitt Town Code § 53-30 unconstitutional in contravention of Article 1 Sections 6, 8 and 11 of the New York Constitution and the First and Fourteenth Amendments to the United States Constitution, and also sought and received preliminary injunctive relief.

7. After joinder of issue, and on or about February 14, 1979, Appellees made a motion for summary judgment dismissing Appellants' Complaint.[1]

8. By decision dated August 17, 1979, and order dated December 6, 1979, New York Supreme Court, Onondaga County, Special Term (Tenney, J.) granted Appellee's motion and dismissed Appellants' complaint and reserved to the individual Appellants all rights to apply for administrative relief regarding the amortization period and variances for non-conforming signs. The basis of the lower court's decision was the application of New York Constitutional law as previously interpreted and applied by the New York Court of Appeals and that this type of aesthetic zoning was uniform, reasonable and a valid exercise of the police power as applied to these Appellants.

9. Thereafter, Appellants filed a notice of appeal as a matter of right on December 10, 1979, to the New York Supreme Court Appellate Division, Fourth Judicial

[1]As a procedural matter, the relief sought should have been request for an order declaring the Sign Ordinance constitutional. This procedural defect was later cured by the New York Court of Appeals' modification to that effect.

Department. The Appellants, same as before this Court, continued to claim that each of them maintained a business establishment or commercial property in the Town of DeWitt. *None of the appellants claimed, or had claimed to this point, that they had any interest, commercial, legal or otherwise in non-commercial speech.*

10. On that appeal, the Appellants advanced the following arguments:

(a) The DeWitt Sign Ordinance was not reasonably related to the public health, safety morals and general welfare of the community despite its admitted aesthetic purpose by reason of the asserted total exclusion of *commercial* free-standing on premises signs;

(b) The lower court erred in its finding that the amortization period for non-conforming signs was adequate as a matter of law;

(c) The Appellants were deprived of their right to freedom of *commercial* speech;

(d) The ordinance denied Appellants equal protection of the law as distinguishing among different forms of *commercial* uses of free-standing signs.

11. By order of the New York Supreme Court, Appellate Division, Fourth Judicial Department entered February 13, 1981, the lower court's order granting Appellees' summary judgment motion dismissing Appellants' complaint was unanimously affirmed with costs on the opinion at Special Term.

12. Thereafter, by motion returnable before the Appellate Division, Fourth Judicial Department on May 4,

1981, the Appellants sought leave from that Court for permission to appeal to the New York Court of Appeals. Said motion was in all respects denied by order of the Appellate Division, Fourth Judicial Department entered on May 8, 1981.

13. Thereafter, by notice of motion dated May 13, 1981, Appellants sought leave to appeal to the New York Court of Appeals on the same grounds as in paragraph 10 above, arguing that those grounds presented novel questions of law. Said application was opposed by Appellees on the ground that there were no novel questions of law presented and the determinations below were in conformity with the existing law of the State of New York as announced by its Appellate Courts. This application for leave to appeal was denied by the New York Court of Appeals by order dated July 6, 1981 and served with notice of entry on July 14, 1981.

14. On or about July 2, 1981, this Court rendered its decision in *Metromedia, Inc., et al., v. City of San Diego, et al.*, 453 U.S. 490 (1981) (Case Number 80-195).

15. Thereafter, and solely on the basis of this Court's decision in *Metromedia, supra,* the Appellants moved, by notice of motion dated July 31, 1981, for reargument of their motion for leave to appeal to the New York Court of Appeals. The basis for the reargument motion was threefold:

(a) The New York Court of Appeals failed to consider and apply the decision in *Metromedia, supra;*

(b) The Town of DeWitt Sign Ordinance was unconstitutional on its face in that it discriminated against non-commercial speech and certain types of lawful commercial speech;

(c) Dismissal of Appellants' complaint without a fact-finding hearing was error.

While the Appellants' first position (subparagraph 15(a) above) was necessarily novel, their position regarding facial invalidity due to restraint on *non-commercial* speech (subparagraph 15(b) above) as then first raised in the New York Court of Appeals was untimely and without basis in the record as there was and could not have been anything to support the Appellants' standing to raise the issue.

16. The Appellants' motion for reargument, and on reargument for leave to appeal was granted by the New York Court of Appeals on September 10, 1981.

17. On appeal, Appellants contended that the Ordinance was discriminatory on its face; it deprived them of the right of speech; that it was not a proper exercise of the Town's police power; and that a fact-finding hearing was necessary to determine the due-process argument of inadequate amortization. The Appellees position in the Court of Appeals was that as raised for the first time and without support in the record, Appellants' attack on the Ordinance's facial validity was untimely and without standing; that insofar as *Metromedia, supra* was applicable, it did nothing to change the existing law of New York as already applied; that there was no constitutionally protected inequal application of the law; and there was no need for a fact-finding hearing.

18. The case was argued on the merits before the New York Court of Appeals on March 23, 1981. At that time, counsel for Appellants conceded what the absence of proof in the record reflected, namely, that the Appellants had no

direct interest in any non-commercial speech nor any commercial interest in others who themselves had such an interest.[2] Counsel for Appellants also conceded that although enforcement of the amortization period had not been effectuated to date, some four years, four months after the amortization period in the Ordinance provided, none of the Appellants had inquired about or availed themselves of any administrative remedy to forestall, abate or change that period as it applied to any of the individuals as provided in the lower court's original order.

19. The New York Court of Appeals by order and opinion dated May 4, 1982, modified only the form of relief granted in the order below by declaring the Town of DeWitt Ordinance constitutional, and as so modified, unanimously affirmed with costs the order of the Appellate Division, Fourth Judicial Department. In so deciding the New York Court of Appeals found as follows:

(a) Appellants tendered no proof in admissible form sufficient to require an evidentiary hearing as to any issues of fact;

(b) Appellants, absent any direct interest in non-commercial speech or any commercial interests in those who did, lacked standing to raise any constitutional First Amendment argument of overbreadth as to the purported facial invalidity of the ordinance by regulation of *non-commercial* speech;

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[2]This is in contrast to the Appellants' newly adopted position at page 7 of their Jurisdictional Statement that "In some instances, Appellants permit the use of their premises for non-commercial, civic oriented programs, messages and promotions." There is no support for this position in the record, and it is boldly raised here for the first time in order to avoid the inevitable finding of lack of standing.

(c) The restraint as to *commercial* speech was permissible as to location and manner, citing prior decisions of that Court.

Despite ultimately having granted leave to appeal for review based solely on this Court's determination in *Metromedia, supra,* the New York Court of Appeals modification was entirely on State Law grounds as neither *Metromedia, supra,* nor any other Federal statute, constitutional provision or court decision was cited as a basis for decision.

20. On or about June 11, 1982, Appellants filed a notice of appeal purportedly pursuant to 28 U.S.C. 1257 (2) and on or about July 16, 1982, filed a Jurisdictional Statement pursuant to Rule 15 of the Rules of the Supreme Court of the United States, served upon appellees on July 26, 1982.

21. This motion is to dismiss the Appellants appeal or affirm the judgment pursuant to Rule 16.1(b) and (d).

LEGAL ARGUMENTS.

The following substantive arguments are made in support of the annexed motion to dismiss or affirm pursuant to Rule 16 of the Rules of the Supreme Court of the United States. Appellees argument is in essence, threefold. First, Appellants lack standing to attack on appeal the facial validity of the ordinance in question as it may relate to non-commercial speech; second, in any event, the judgment of the New York Court of Appeals does not now raise a substantial federal question as it rests on an adequate non-federal basis; and finally that this Court has clearly and recently determined adversely to Appellants any issues of which the Appellants do have standing.

POINT I.

The Appellants lack standing to attack the facial validity of the ordinance in question by constitutional First Amendment argument of overbreadth as they have neither a direct interest in nor a commercial interest related to others whose right they seek to assert in the non-commercial speech purportedly limited.

Each of the individual Appellants herein owns or maintains one or more business establishments or commercial properties. By and large, their names, as they appear in the caption, reflect the type and nature of their businesses. For the most part, they exist along a commercial strip of roadway known as Erie Boulevard in the Town of DeWitt. None of these businesses engages in non-commercial speech as a part of their business or enterprise.

As such, if the Appellants have standing at all to argue the facial validity of the Town of DeWitt Sign Ordinance on the basis of restriction of non-commercial speech, that standing must come from the First Amendment overbreadth doctrine. In general, that doctrine, in certain circumstances, has allowed one party to assert the denial of protection to the right of speech of another, e.g. *Bigelow v. Virginia,* 421 U.S. 809, 811 (1975); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Smith v. California,* 361 U.S. 147 (1959). Each of the cases has in common that the overbreadth application was made available to a party having a commercial interest in the protected speech, and not merely an interest in commercial speech.

Most recently, this Court fully has discussed the rule with such clarity that its inapplicability at bar is readily seen, and which deprives the Appellants of their claim to standing. In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) this Court stated at 380-381:

The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court. See, e.g. *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973); *United States v. Raines,* 362 U.S. 17, 21 (1960); *Ashwander v. TVA,* 297 U.S. 288, 347 (1936) (Brandeis, J. concurring). The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute. See *NAACP v. Button,* 371 U.S. 415, 433 (1963). Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.

But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S., at 771 n. 24, there are 'commonsense differences' between commercial speech and other varieties. See also *id.,* at 775-781 (concurring opinion). Since advertising is linked to commercial wellbeing, it seems unlikely that such

> speech is particularly susceptible to being crushed by overbroad regulation. See *id.*, at 771-772, n. 24. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. *Ibid.* Since overbreadth has been described by this Court as 'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' *Broadrick v. Oklahoma,* 413 U.S., at 613: we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective (Citation omitted).

Thus, in the commercial speech area, it fairly may be said that one who has and claims a general interest in commercial speech does not inherit the possible standing of a non-commercial speech party who may seek the benefit of protection of that speech, unless the claiming party is linked to the other party through some definite commercial interest.

Appellants raised, for the *first* time in the New York Court of Appeals the argument that the DeWitt Sign Ordinance was unconstitutional on its face by its prohibition of certain types of non-commercial messages while favoring certain commercial messages (See Point I Appellants' Jurisdictional Statement at 10-11). Specifically it was alleged that while certain multiple commercial users were permitted free standing signs, no non-commercial users were allowed access to such free standing signs. The thrust of this argument was that the DeWitt Sign Ordinance gives greater protection to commercial than non-commercial

speech through regulation. In this sense, the Appellants claim their argument is similar to that raised by the Appellants in *Metromedia, supra.*

The crucial distinction, of course, is that the Appellants in *Metromedia, supra*, gained their standing from their commercial interest in protected speech derived from the regulation of billboard space they sold or had available for sale for non-commercial speech content as a regular part of their business. At bar, none of the appellants have either a direct interest in non-commercial speech, or a commercial interest, direct or indirect, in non-commercial speech. As such, there is no rationale to apply the overbreadth doctrine to Appellants at bar to contest the facial validity of the Ordinance, *see Metromedia, supra* at 504 (n. 11), even assuming such an attack might be made.

Regardless of Appellants' attempts at augmenting the record upon which all prior decisions have been made nothing could change the fact that contrary to *Metromedia, supra,* there is no content-based regulation in the DeWitt Ordinance which would give rise to an attack on the facial validity of the Ordinance. Even assuming *arguendo* there was such a theoretical basis for discussion, Appellants have failed to raise any factual basis for their assertion of standing. Contrary to Appellants' attempted comparison, nothing about the Appellants' enterprises is analogous to the existence of or probability of non-commercial speech infringement in the sale of billboard space that existed in *Metromedia, supra,* for the billboard enterprise inherently touches upon questions of speech content.

However, Appellants' current claim that they were precluded below from establishing their interest in non-commercial speech (Jurisdictional Statement at 14-15) is

utterly misleading *as they never raised this issue until their motion for leave to reargue for leave to appeal to the New York Court of Appeals,* well after the issues, record and orders deciding the issues had been drawn. As the record is barren of any facts establishing a cognizable interest of Appellants in non-commercial speech, and the absence of facts is attributable solely to Appellants' failure timely to raise the issue, Appellants must be found to lack standing to contest the facial validity of the Ordinance as it relates to non-commercial speech.

POINT II.

The decision and judgment of the New York Court of Appeals rests on an adequate state law basis and does not involve a substantial Federal Question.

A review of the procedural history of this case taken together with the decision of the New York Court of Appeals, leads inevitably to the conclusion that the State determination below rests on an adequate state law basis and does not involve a substantial Federal Question. Appellants first sought leave to appeal to the New York Court of Appeals on each of the grounds herein raised, on the purported basis that said grounds raised novel questions of law. That application was denied in all respects.

That application for leave to appeal was renewed by motion for reargument, the sole basis for said second motion being this Court's determination in *Metromedia, supra.* For the purpose of determining whether *Metromedia, supra* affected New York Law or applied to the facts of this case in a way which would alter prior determinations, the New York Court of Appeals ultimately granted leave to appeal.

However, once the issues were fully briefed and argued on the merits, the New York Court of Appeals modified the form but not the legal conclusions drawn on a state law basis, and as modified, affirmed the order below. The New York Court of Appeals' decision reflects that the substantive legal conclusions were based solely on prior decisions of that Court.[3] In fact, the absence of any discussion of or citation to *Metromedia, supra* on substantive issues is indicative both that *Metromedia, supra* did not affect existing and dispositive state law and that there was no need to require a federal law basis for decision. This conclusion, we submit, is inescapable if we recall that the sole basis for review on leave to appeal was Appellants' raising the recent decision in *Metromedia, supra,* in their motion to reargue.

The remaining issues on appeal to the New York Court of Appeals were dealt with from a factual basis according to State law requirements. The New York Court of Appeals found that the Appellants had not raised any sufficient questions of fact as to either the constitutionality of the Ordinance *as applied* to their individual commercial speech situations or the reasonableness of individual application of the amortization schedule to non-conforming signs. By this determination, the New York Court of Appeals in *Syracuse Savings Bank v. Town of DeWitt, infra,* at 673, found that by the proof offered in the state procedural posture adopted by Appellants, the only issue was one of facial validity as applied to commercial speech (see Point III, *infra*), in the following language:

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[3] *See Syracuse Savings Bank v. Town of DeWitt,* 56 N.Y.2d 672, 673 where the Court cites *Suffolk Outdoor Advertising Co. v. Hulse,* 43 N.Y.2d 483 and *Modjeska Sign Studios v. Berle,* 43 N.Y.2d 468. While *Suffolk* was later affirmed by this Court at 439 U.S. 808 (1978), it is noteworthy that the Court of Appeals chose to cite as its support its own decision on the State level.

> In this action seeking a declaration that the 'sign ordinance' of the Town of DeWitt is unconstitutional, the Appellate Division affirmed Supreme Court's dismissal of the complaint on the motion of defendant town for summary judgment. Inasmuch as plaintiffs tendered no evidentiary proof in admissible form there is no evidence before us as to the practical application of the ordinance or its prospective impact in the Town of DeWitt, and no showing of facts sufficient to require an evidentiary hearing as to issues of fact. Accordingly, on the record before us the sign ordinance can be considered only in the abstract without consideration of any impact on plaintiffs. From that very narrow perspective we perceive no error made by the courts below in upholding the constitutionality and validity of the ordinance against the challenges mounted by plaintiffs. We address only the principal contentions advanced by plaintiffs in our court.

Specifically with regard to the Appellants due process argument related to the amortization period the New York Court stated in its opinion, *supra* at 673-674:

> Nor is there any proof in the record that the four-year, nine-month period between the adoption of the ordinance and its effective date created an impermissibly short amortization period.

In so finding, the Court noted in its footnote 2 that the Appellants had failed to exhaust their local and state administrative remedies, which were specifically reserved to them in the Special Term's decision granting Appellees' original motion, which in and of itself deprives Appellants of any right of review in this Court.

POINT III.

The issues raised by appellant have recently and adequately been answered by this Court's determination in *Metromedia, Inc., et al., v. City of San Diego, et al.*

A careful reading of the legal rationale for the plurality opinion in *Metromedia, supra,* and the facts upon which those legal conclusions were drawn, shows that the Appellants' position is entirely misconceived in the law and facts in that the determinations of this Court and of the Courts of the State of New York are completely consistent with the validity of the Town of DeWitt Sign Ordinance.

The plurality opinion in *Metromedia, supra* may be broken down into two parts. First, this Court found that the City of San Diego sign ordinance prohibiting "outdoor advertising display signs" (billboards) which distinguished between on-site and off-site advertising (i.e., different commercial uses) was constitutional as a proper exercise of a State's police power for safety and aesthetic purposes.[4] This initial determination in turn relied on a two part analysis.

First this Court found sufficient the San Diego public policy (safety and aesthetics) competing with the flexible First Amendment protection otherwise available to commercial speech. The Supreme Court then found a rational basis for the City's discrimination among competing *commercial* uses (i.e. on and off site uses).

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[4]At bar, there is no distinction made in the Town of DeWitt Sign Ordinance, as in San Diego, between accessory and non-accessory uses and no issue herein drawn because none of the Appellants are in the billboard or off-site advertising business for that issue to be relevant.

It was the second part of that decision, however, which found that as the same San Diego Ordinance prohibited *all non-commercial* (whether on or off site) billboard speech it was unconstitutional on its face. The essence of this Court's decision lay in an evaluation of the relationship between the police power and the relative First Amendment protection to be afforded to commercial and non-commercial speech. We believe this Court continued its rule that while commercial speech is entitled to some benefit of First Amendment protection, that protection is not necessarily the same which is to be afforded noncommercial speech as non-commercial speech has the benefit of relatively favored protection.

Initially, we turn to an evaluation of the first part of the Court's analysis resulting in a determination of constitutionality, for in the absence of Appellants' standing on the overbreadth doctrine it is this analysis which is appropriate to and controlling of the Appeal presented at bar.

The rights to be afforded commercial speech are measured by a balance between the municipalities, need and desire to exercise its police power for the safety and esthetics of its community, as against the interest *it* perceives in the value to its community of the commercial speech. Where the value of commercial speech is outweighed by lawful community needs, or may be met by alternative means, the protection afforded commercial speech must bend to accommodate the community perceived balance.

This Court in *Metromedia, supra* at 502 traced the development of commercial speech protection in the context of billboards in the following language:

> Billboards, then, like other media of communication, combine communicative and noncommunicative aspects. As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium, *Kovacs v. Cooper, supra,* but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulatory interests with the individual's right to expression. "(A) court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 91, 97 S.Ct. 1614, 1617, 52 L.Ed.2d 155 (1977), quoting *Bigelow v. Virginia,* 421 U.S. 809, 826, 95 S.Ct. 2222, 2234, 44 L.Ed.2d 600 (1975).

and at 505:

> In *Virginia Pharmacy Board v. Virginia Consumer Council,* 4252 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), we plainly held that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection: A state may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients. That decision, however, did not equate commercial and non-commercial speech for First

> Amendment purposes: indeed, it expressly indicated the contrary. See 425 U.S., at 770-773, and n. 24, 96 S.Ct., at 1830-1831. See also id., at 779-781, 96 S.Ct., at 1834-1835 (STEWART, J., concurring.)

and at 506 this Court quoted its opinion in *Ohralik v. Ohio Bar Association*, 436 U.S. 447, 456 (1978):

> 'To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.'

and also at 506, this Court finished its analysis by stating:

> Finally, in *Central Hudson v. Public Service Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we held that: "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests by its regulation." *Id.*, at 562-563, 100 S.Ct., at 2349-2350 (citation omitted). We then adopted a four-part test for determining the validity of

> government restrictions on commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective. *Id.*, at 563-566, 100 S.Ct., at 2350-2351.

It is with this background in mind that we look to the application of the four part test at bar to ascertain the validity of the alleged governmental restriction on freedom of commercial speech in the Town of DeWitt Ordinance, as the Court readopted from *Central Hudson v. Public Service Commission,* 447 U.S. 557 (1980). For the purpose of this argument we will assume the first step is met at bar, that being that the commercial speech in question which substantially business identification, is valid and that it concerns legal activity and is not misleading.

In the second step, a determination must be made that the ordinance seeks to implement a substantial government interest. The Court stated in *Metromedia, supra,* at 507-508, that there can no longer be doubt that the protection of urban appearance is a substantial governmental goal, *see Penn Central Transportation Co. v. New York City,* 438 U.S. 14 (1978); *Suffolk Outdoor Advertising v. Hulse,* 43 N.Y.2d 483, *aff'd* 439 U.S. 808 (1978). The Appellants have conceded that the aesthetic purpose at bar seeks to implement a substantial governmental interest (Jurisdictional Statement at 13).

A similar evaluation may be made of the next criteria which requires that the Ordinance directly advances the

stated governmental interest. At bar, the original contention by the Appellants had been that the record was inadequate to effectuate a decision on that issue. That is exactly the contention that was before this Court in *Metromedia, supra,* to which the Court spoke in these words at 509-510:

> We likewise hesitate to disagree with the accumulated, common-sense judgments of local law makers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. . . .
>
> We reach a similar result with respect to the second asserted justification for the ordinance-advancement of the City's esthetic interests. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived an 'esthetic harm'. San Diego, like many other states and municipalities, has chosen to minimize the presence of such structures. Such esthetic judgments are necessarily subjective, defy objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has an ulterior motive the suppression of speech, and the judgment involved herein is not unusual as to raise suspicions in itself.[3]

There was no claim at bar that the Town of DeWitt has an ulterior motive like the suppression of speech in the enactment of this ordinance.

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[3]As the Trial Court noted, there has never been any evidence of, or indication that the aim of the ordinance was other than to achieve a proper aesthetic purpose. In fact, the Appellants' papers have conceded this (Jurisdictional Statement at 13).

Now, however Appellants have asserted that the failure to *uniformly* apply the prohibition against free-standing signs "denigrates the Appellees purported interest in aesthetics and causes the Ordinance to fail the third *Central Hudson* Test (Jurisdictional Statement at 13)." The basis for this assertion, according to Appellants, is that allowing a small number of free-standing signs to the extremely limited number of malls, shopping centers and industries in the Town of DeWitt is illogical or irrational in the face of depriving the mass of individual retail stores and business their own unrestricted free-standing signs. One need only drive down Erie Boulevard as it presently exists, as the members of the Town Zoning Board have many times, to observe the distracting maze-like forest created by free-standing signs of all sizes and shapes, to realize the fallacy in Appellants' position.

This Court in *Metromedia, supra,* certainly dispelled any notion, as raised by Appellants, that a municipality is not free to distinguish among various commercial uses. In its discussion, the Court confirmed that it is indeed consistent for a municipality to properly distinguish among competing commercial uses by allowing protection to some, while denying others. The following discussion, at 510-511, is directly analogous at bar and bears repeating:

> It is nevertheless argued that the city denigrates its interest in traffic safety and beauty and defeats its own case by permitting on-site advertising and other specified signs. Appellants question whether the distinction between on-site and off-site advertising on the same property is justifiable in terms of either esthetics or traffic safety.
>
> In the first place, whether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of

> traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising. Second, *the city may believe that off-site advertising, with its periodically changing content, presents a more acute problem than does on-site advertising. See Railway Express, supra,* 336 U.S. at 110, 69 S.Ct. at 465. Third, San Diego has obviously chosen to value one kind of commercial speech—on-site advertising—more than another kind of commercial speech—off-site advertising. *The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance—on-site commercial advertising—its interests should yield. We do not reject that judgment.* (emphasis added)

Likewise, the Town of DeWitt is free to determine that the interest in identifying major shopping centers, malls and industries by free-standing signs, out-weighs or does not conflict with aesthetic purposes by reason of their extremely limited number, confined and controlled location or for any other reason.

Finally, the ordinance must reach no farther than necessary to accomplish the given objective. The Appellants' position in this regard is entirely misconceived as based upon the supposition that the DeWitt Ordinance prohibits all free-standing *and* on-site advertising signs. This position is contrary to a careful reading of the ordinance.

We note that on-site attached advertising or identification signs are freely permitted in the zones in question (see,

e.g. § 55-30 C (1)). By allowing such signs equally accessible to all commercial and non-commercial speech uses, the Town of DeWitt has provided in its judgment a reasonable alternative to unrestricted free-standing signs aimed primarily at allowing business identification. In *Metromedia, supra* at 511-512, this Court found it permissible to prohibit accessory (off-site) billboard advertisement as long as businesses were allowed on-site advertisements. At bar, it is again directly analogizable that in certain circumstances, free-standing commercial advertisement is prohibited while on-site, though attached, advertisement is permitted to allow an operative form of advertising and identification.

We next turn to the Ordinance and find that it takes cognizance, generally, of the existence of free-standing signs in the Town of DeWitt. Also, Ordinance Section 55-30 (A) (8) specifically limits the prohibition of accessory signs only to commercial enterprises, *not speech content,* and then only as not otherwise permitted. (See 55-30 E(2)).

When these subparagraphs are taken together with a further reading of the entire ordinance which nowhere specifically prohibits non-commercial use of free-standing or attached signs, the inescapable conclusion is that free-standing signs, although limited as to manner, location and nature, are permitted in the Town of DeWitt without restriction as to content. It has of course long been true that ordinances which limit only the nature, location and manner of such communications are lawful and constitutional, *Virginia State Board of Pharmacy v. Virginia Consumer Counsel, Inc.*, 425 U.S. 748 (1976); *Suffolk Outdoor Advertising v. Hulse, supra.*

The crux of this Court's determination in *Metromedia, supra* that the San Diego Ordinance was unconstitutional was found in syllogistic logic that once a municipality finds that its interest in exercising its police power ought to give way to certain commercial speech, it *must* also be true that those same police power interests must give way to non-commercial speech, as non-commercial speech always enjoys greater benefit than commercial speech. The fault found therefore in the San Diego Ordinance was that a greater protection had been given to commercial speech over noncommercial speech, as all non-commercial billboard speech content was prohibited, whereas only off-site commercial billboard speech content was prohibited. That is not at all the case in the Town of DeWitt.

The facts at bar pertinent to this discussion are simply as follows: There is nothing in the Town of DeWitt Sign Ordinance which prohibits or restricts speech content on any sign which is allowed; the converse of which is that non-commercial speech is allowed on all types of signs within all zones. Thus, there is nothing in the Sign Ordinance which impermissably regulates sign *content,* only its type and place. This is entirely different from the San Diego Ordinance, which *did* regulate sign content in that non-commercial speech use was everywhere prohibited by the San Diego Ordinance, *Metromedia, supra* at 514-515. As such, *Metromedia, supra,* although dispositive of the issues at bar, does nothing to affect the validity of the Town of DeWitt Ordinance, nor does that Ordinance now raise any issues which require clarification, amplification or review of this Court's determination in *Metromedia, supra.*

CONCLUSION.

For all the foregoing reasons, the appellants' appeal should be dismissed in all respects or in the alternative, the judgment of the New York Court of Appeals should be affirmed in all respects.

Dated: August 12, 1982
Syracuse, New York

ERIC M. ALDERMAN
Attorney of Record for Appellee
512 Loew Building
Syracuse, N. Y. 13202
(315) 422-8131

ALDERMAN, SAMUELS, JERRY & ROSSI
Attorneys for Town of DeWitt

A 1

Section 53-30, Town Code of the Town of DeWitt, Onondaga County, New York

§ 53-30. Sign regulations. [Amended 12-18-67; 3-26-73]

A. General regulations. The following regulations apply to all signs:

(1) No sign in any district may extend over a sidewalk or public right-of-way.

(2) No sign in any district, unless attached to a building, shall be located nearer to a street line than twenty-five (25) feet, nor nearer to a side line than ten (10) feet, except in an Industrial District where it shall not be nearer than thirty-five (35) feet to a side line.

(3) No sign in excess of ten (10) square feet in area shall hereafter be erected, installed or altered except upon written sign permit issued by the Building Code Enforcement Officer.

(4) The area of a sign shall be measured by the area of its background frame where such a frame has been effected by materials, paint, lighting or other means. If the total rectangular areas of letter and symbol groupings in a sign are less than forty percent (40%) of the area of its frame, the maximum permitted area of the sign may be increased by sixty percent (60%). Where a sign consists solely of independent letters or symbols without such a frame, its area shall be measured by the rectangular areas encompassing the letter or symbol groupings. In all districts, except Industrial Districts, for each fifty (50) feet beyond the first hundred (100) feet in depth that a sign is located from the nearest highway, an additional ten percent (10%) may be added to the permitted area of the sign up to a maximum of one hundred percent (100%).

(5) Advertising display upon any structure shall be regarded as a sign subject to this ordinance.

(6) No sign attached to a building in any district other than an Industrial District shall project above the height of the wall upon which it is attached. No sign shall be attached to a wall or facade higher than the average height of the remaining walls of the building. No freestanding sign shall be higher than twenty-five (25) feet above the grade.

(7) No illuminated sign or outdoor illumination shall direct light in a way which would create a traffic hazard, or be unreasonably detrimental to adjoining or neighboring residences.

(8) All accessory advertising devices of commercial enterprises other than signs permitted by these regulations, such as, but not limited to, bunting, pennants, pinwheels, streamers or peripheral lighting are prohibited. No sign shall be flashing, revolving, animated or otherwise in motion. Permits for the temporary display of special announcements for the opening or closing of a business, or for other specific purpose may be granted by the Building Code Enforcement Officer, upon controlled site approval of the Planning Board in accordance with Article XI.

(9) No sign shall obstruct any fire escape, window, door or opening used as a means of egress, for fire-fighting purposes or for ventilation. No sign shall be placed on any sidewalk, hydrant, lamppost, tree, utility pole, fence, or on other public property, except as permitted by other provisions of this section.

(10) All signs which do not conform to the regulations of this ordinance shall be brought into conformity or removed by January 1, 1978. No structural element of a nonconforming sign may be changed unless the resulting sign complies with the current regulations of this ordinance.

(11) Multiple-use establishments in nonresidential districts shall be subject to the following regulations:

(a) Signs for two (2) or more separate business establishments on the same lot or in the same building shall require controlled site approval of the Planning Board as provided in Article XI and upon the further finding that such signs are of a design compatible in style and color with one another.

(b) Shopping centers containing more than six (6) business establishments or over fifty thousand (50,000) square feet of gross floor area shall additionally be permitted to have one (1) shopping center identification sign which may be freestanding, the area of which shall not exceed one and one-half (1½) times the allowable area of a sign in the district at its proposed location, provided that the maximum area of signs for each single establishment within the shopping center visible from the property line shall be reduced by one-half (½).

(c) Shopping centers containing over five hundred thousand (500,000) square feet of gross floor area shall additionally be permitted to have two (2) shopping center identification signs, which

may be freestanding, the total combined areas of which shall not exceed twice the allowable area of a sign in the district at its proposed location, provided that the maximum area of signs for each single establishment within the shopping center visible from the property line shall be reduced by one-half (½).

(d) Enclosed mall shopping centers containing over five hundred thousand (500,000) square feet of gross floor area shall be permitted to have three (3) shopping center identification signs, which may be freestanding, the total combined areas of which shall not exceed three (3) times the allowable area of a sign in the district at its proposed location, provided there are no other shopping center signs visible from the property line.

(12) In all office, industrial or similar complexes consisting of two (2) or more buildings, no sign identifying said complex shall be erected or used except upon controlled site approval of the Planning Board in accordance with Article XI.

(13) In all districts except residential districts, a single non-illuminated temporary advertising sign for the sale or rental of the property upon which it is located may be erected or used except that it may not exceed sixteen (16) square feet in area and must be removed within fourteen (14) days of sale or rental.

B. In residential districts, no sign shall be erected or used except:

Section 53-30, Town Code of the Town of DeWitt, Onondaga County, New York

(1) A single professional or announcement sign which may be illuminated by white light, nor more than two (2) square feet in an area not more than six (6) inches in depth, attached to and parallel with a principal building facade so that its top shall not extend higher than eight (8) feet above finished grade.

(2) A single nonilluminated temporary advertising sign which may be freestanding or attached to the building, nor more than three (3) square feet in area, for the sale or rental of the property upon which it is located, provided that such sign is removed within fourteen (14) days of sale or rental.

(3) A single advertising sign which may be illuminated by white light on one (1) or two (2) faces and may be freestanding or attached to the building but which shall not be more than two (2) square feet in area, for the sale of agricultural products grown on the premises.

(4) Identification signs for multiple-family dwelling projects upon controlled site approval of the Planning Board in accordance with Article XI.

(5) Signs of duly constituted governmental bodies, including traffic or similar regulatory devices, legal notices or appropriate to public or quasi-public buildings.

(6) Signs, posters, flags, plaques or emblems of a temporary nature of political, civic, philanthropic, educational or religious organizations.

(7) Signs not visible off the lot upon which they are situated.

(8) Nonilluminated directional and identification signs not more than one and one-half (1½) square feet in area.

(9) Single builders', architects' and engineers' signs not more than fifteen (15) square feet in area may be erected on a construction site during construction, provided that such sign shall be removed within fourteen (14) days after completion.

C. In Business Transitional Districts, no sign shall be erected or used except:

(1) Those permitted in residential districts.

(2) No more than one (1) sign per street facade for the identification of each primary business conducted on the premises (or its proprietor), not to include advertising of specific products. Each sign shall be attached to and parallel with a street facade of the principal building, may be illuminated and shall have a total area not greater than eight percent (8%) of that proportion of such facade as the floor space of such primary business bears to the total floor space of the building, but not greater than fifty (50) square feet, except as may be modified by provisions of the general regulations.

D. In Business Districts, no sign shall be erected or used except:

(1) Those permitted in residential districts.

(2) Not more than three (3) signs for the identification of each business conducted on the premises. Such signs shall be attached to and parallel with a street facade of the principal building, may be illuminated, and shall have a total area not greater than ten percent (10%) of that proportion of such facade as the floor space for such business bears to the total floor space of the

building, but not greater than a total of seventy-five (75) square feet, except as may be modified by provisions of the general regulations.

E. In Industrial Districts, no sign shall be erected or used except:

(1) Signs permitted in business districts.

(2) Not more than three (3) signs for the identification of an industrial activity conducted on the premises. Such signs may be illuminated, may be freestanding or attached to the building and shall have a total area not greater than fifteen percent (15%) of a street facade of the principal building but not greater than a total of one thousand (1,000) square feet, except as may be modified by provisions of the general regulations.

Memorandum Decision of the Court of Appeals of New York, dated May 4, 1982

STATE OF NEW YORK
COURT OF APPEALS

4 No. 204
Syracuse Savings Bank, et al.,

Appellants,

v.

Town of DeWitt,

Respondent.

(204) Leonard C. Koldin & Benjamin D. Levine, Syracuse, for appellants.

Eric M. Alderman, Joseph W. Jerry, & Bernard Samuels, Syracuse, for respondent.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

MEMORANDUM.

The order of the Appellate Division should be modified, with costs to respondent, to the extent of directing judgment in favor of defendant declaring that Section 53-30 of the Town Code of the Town of DeWitt is constitutional insofar as it regulates commercial speech.

In this action seeking a declaration that the "Sign Ordinance" of the Town of DeWitt is unconstitutional the Appellate Division affirmed Supreme Court's dismissal of the complaint on the motion of defendant Town for summary judgment. Inasmuch as plaintiffs tendered no evidentiary proof

in admissible form[1] there is no evidence before us as to the practical application of the ordinance or its prospective impact in the Town of DeWitt, and no showing of facts sufficient to require an evidentiary hearing as to issues of fact. Accordingly, on the record before us the sign ordinance can be considered only in the abstract without consideration of any impact on plaintiffs. From that very narrow perspective we perceive no error made by the courts below in upholding the constitutionality and validity of the ordinance against the challenges mounted by plaintiffs. We address only the principal contentions advanced by plaintiffs in our Court.

At the threshold we observe that because plaintiffs, an extensive assemblage of business and commercial enterprises in the Town, have shown no direct interest in noncommercial speech and no commercial interest in others who themselves have such an interest, they lack standing to raise any constitutional First Amendment argument of overbreadth to challenge the ordinance to the extent that it regulates, or may be said to regulate, non-commercial speech.

With reference to the application of the ordinance to commercial speech, we cannot conclude that the near total proscription of free standing signs or the regulation of on-building facade signs as to size and height do not constitute, on the face of the ordinance, a permissible constraint only as to

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[1]The only exception, immaterial for present purposes, was the affidavit of the former Town Director of Police with respect to conditions of vehicular and pedestrian traffic in the Town and his opinion as to the impact of the sign ordinance thereon.

Contrast, for instance, the extensive discovery leading to the comprehensive stipulation of facts on which the courts' rulings were based in *Metromedia, Inc. v City of San Diego* (___ US ___, 49 USLW 4925), on the basis of which plaintiffs sought and obtained leave to appeal in this case.

location and manner *(Suffolk Outdoor Adv. Co. v Hulse,* 43 NY2d 483; *Modjeska Sign Studios v Berle,* 43 NY2d 468). Nor is there any proof in the record that the four-year, nine-month period between the adoption of the ordinance and its effective date created an impermissibly short amortization period.[2]

Inasmuch as this is a declaratory judgment action, the proper disposition on the granting of defendant's motion for summary judgment should have been a declaration that the sign ordinance is constitutional rather than a dismissal of the complaint *(Lanza v Wagner,* 11 NY2d 317, 334).

* * * * * *

Order modified, with costs to respondent, in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Meyer concur.

Decided May 4, 1982

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[2]We note the provision in the order of Supreme Court, affirmed at the Appellate Division and left standing by us, "that all rights are reserved to the individual plaintiffs to apply for appropriate administrative relief from the defendant upon a proper demonstration of need for such relief."